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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-408

RUBEN MORALES ROBLES
and ROBERT DALE HART,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Tucson, Arizona 85701

and

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The petitioners, RUBEN MORALES ROBLES and ROBERT DALE HART, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case, entered on July 22, 1976.

OPINION BELOW

The judgment of the Court of Appeals for the Ninth Circuit, en banc, was entered on July 22, 1976. A timely Petition for Rehearing was denied on August 19, 1976.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit is not yet reported but is attached hereto, infra, at page i.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

A. What efforts does the government have to make, to produce for trial, a non-resident alien whom they have employed as an informer?

B. If the government must use every reasonable effort to obtain the presence at trial of this non-resident alien employee, who was a participant witness, did they use such efforts in this case?

C. On the question of the use of "reasonable efforts" does the "clearly erroneous" rule apply?

D. Even if the clearly erroneous rule applies, wasn't the trial court's finding that reasonable efforts were made clearly erroneous?

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Amendment V to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

2. Amendment VI to the United States Constitution

In all criminal prosecutions, the

accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF FACTS

On April 3, 1974 the petitioners were arrested by agents of the United States Government (D.E.A.) for distribution of cocaine. On May 9, 1974 petitioners were charged by indictment with distribution of cocaine in violation of U.S.C., Section 841(a)(1).

Prior to trial, a motion for the identification and production of informers was granted by the trial court. The

government failed to produce the informer, Murrieta, who, it is acknowledged, had all of the information concerning the alleged crime. When it became apparent that the government would not produce this witness, both the petitioners moved, in the alternative, either for a continuance or for a dismissal of the charges; the motions were denied and petitioners went to trial without the benefit of the witness, Murrieta.

On August 14, 1974, the petitioners were found guilty by jury verdict. On September 18, 1974, judgment was entered on the verdict and petitioners were sentenced to imprisonment for five (5) years, a three thousand dollar ($3,000.00) fine, and special probation of five (5) years. On September 20, 1974, Robles was released on bond pending appeal and is still released on said bond. The defendant Hart is presently released on

his own recognizance by virtue of the order of the Ninth Circuit Court of Appeals, pending the outcome of his appeal.

The informer, Murrieta, is and was a resident of Magdalena, Sonora, Mexico, a town sixty-five miles south of the international border between Mexico and the United States. He lived there when he was hired by the D.E.A. and continued to live there, according to all available information, up to and including the time of petitioners' trials. During the year and a half immediately preceding the petitioners' trials, the informer, Murrieta, had been utilized by the D.E.A. sixteen (16) times, ten of those cases were commenced solely within Tucson, Pima County, Arizona, and had nothing to do with his status as a non-resident alien. (It is acknowledged that it might be worthwhile for the D.E.A. to hire non-

resident aliens as informers for the purposes of developing or making cases that involve smuggling narcotics or contraband across the international border; however, it is not acknowledged that such "special employees" should be used to make cases solely within the United States having nothing to do with their non-resident alien status, and then sent back to Mexico beyond the reach of the process of the courts of the United States.)

The agents did not know Murrieta's address or telephone number and had no way to get in touch with him; any contact between the government and its special employee has to be initiated by Murrieta. The government deliberately avoided obtaining any information that any reasonably prudent police officer would have obtained; information that would have assisted in

locating the government informer who was a participant in the crime. The only efforts made by the government to obtain the informer, Murrieta, for trial was to tell him over the telephone that he had to be in Tucson for the trial.

REASONS TO GRANT WRIT

This court should grant the writ in the instant case because:

I.

THE NINTH CIRCUIT HAS RULED ON AN IMPORTANT FEDERAL QUESTION CONCERNING THE RIGHTS OF AN ACCUSED UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES; THESE QUESTIONS HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This Court has consistently recognized the importance of compelling a witness to give testimony in the courts of this land.

> "[I]t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly

summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public." Blair v. United States, 250 U.S. 273, 281 (1919); Hurtado v. United States, 410 U.S. 578, 589 (1973).

The case presently before the court involves a situation where the government, through an agent of the Drug Enforcement Agency (D.E.A.) has created a situation where a material witness, essential to the presentation of a defense, is left beyond the subpoena power of the United States. By employing Mexican citizens to come into

our country to "make a case" the D.E.A. has stood by and allowed the administration of justice to rest upon the whim of a Mexican citizen who alone is left to decide whether he will testify in a case in which he has participated.

The Sixth Amendment's guarantee of compulsory process has consistently been upheld by this Court to be an essential element of due process and fundamental fairness. Washington v. State of Texas, 388 U.S. 14 (1967). In the present case, it is respectfully submitted that this court should decide that the conduct of the government officials has denied the petitioners their Fifth Amendment right to due process, and their Sixth Amendment right to compulsory process.

Specifically, the present case presents a situation where the D.E.A. employs persons who are entirely outside the subpoena power of the United States,

to come in to the United States and try to make a case in hopes of getting a reward. The D.E.A. agent in charge of these special employees has intentionally put himself in a position where he cannot contact them; rather the informers must instigate all contact. The government has created a situation where petitioners were denied vital Fifth and Sixth Amendment rights.

The Ninth Circuit opinion, below, represents a great departure from the traditional view concerning the government's duty with respect to informants. Heretofore, in Velarde-Villareal v. United States, 354 F.2d 9, 13 (9th Cir. 1965), the Ninth Circuit noted as follows:

> "The practice of the government in employing agent-informers in narcotics cases is well

known. We also know that such agents are usually not trained officers--often they are themselves addicts or former addicts. The government must know that an eager informant is exposed to temptations to produce as many accused as possible at the risk of trapping not merely an unwary criminal but sometimes an unwary innocent as well. One could hardly expect such informers always to stay on the proper side of the line which separates the two cases. And since the government chooses to utilize such agents, with the attendant risk of entrapment, it is fair to require the govern-

ment which uses this inherently dangerous procedure to take appropriate precautions to insure that no innocent man should be punished." Velarde-Villareal v. United States, 354 F.2d 9 at 13 (9th Cir. 1965).

Later, the Ninth Circuit suggested that conditioning future employment upon the informant's availability as a witness was an appropriate guideline in determining the reasonableness of the government's effort to produce such an informant.

Yet, in the present case, the Ninth Circuit has affirmed petitioners' convictions where there has been no such effort. Considering that the Velarde-Villareal language has been universally applied throughout the circuits, such a vast departure from its holding merits

review by this court.

The Ninth Circuit, in its opinion, below, has apparently also departed from the principle that due process requires that the defendant be given a chance to confront witnesses before the actions of the government place that witness beyond the subpoena power. United States v. Mendez-Rodriguez, 450 F.2d 1 (9th Cir. 1971). Yet, in the case presently before the Court, there is a situation where the government, from the inception of its actions, has been able to effectively preclude the petitioners from calling the one witness who can testify in their behalf. Heretofore, the courts have been unwilling to accept such a blatantly unfair proposition.

"The thrust of Mendez-Rodriguez (supra) is to prevent the basic unfairness of allowing the Government to

determine which witness will not help either wide and then to release those witnesses, for all practical purposes, beyond the reach of the defendant. . . . The vice lies in the unfettered ability of the Government to make the decision unilaterally." United States v. Tsutagawa, 500 F.2d 420, 423 (9th Cir. 1974).

Petitioners submit that the actions of the government have placed them in a situation where the government has unilaterally placed a witness beyond the subpoena power.

These important Fifth and Sixth Amendment questions concerning the use of foreign citizens in investigations solely within the United States, need to be resolved by this court. It is

respectfully submitted that the present case presents an appropriate situation for the court to rule on such issues.

II

THE "REASONABLE EFFORTS" STANDARD APPLIED BY THE NINTH CIRCUIT BELOW IS CONTRARY TO THE STANDARD USED BY OTHER CIRCUIT COURTS OF APPEAL AND, THUS,GIVES RISE TO A CONFLICT AMONG THE CIRCUITS.

As noted by the dissenting opinion below:

> "[T]he majority's view that the government carried its burden of proving that it used reasonable efforts to produce these informants reduces that burden to feather lightness. "Reasonable efforts' in this case is diminished to 'try a little." That result cannot be squared with the concerns that engendered the rule." (Dissenting Opinion of Judge Hufstedler, Slip Opinion at p 14.)

The majority opinion has indeed placed a new and unique interpretation on what is called "the reasonable efforts" standard. Such a break in the traditional definition of what are"reasonable efforts" places the Circuits in conflict as to what guidelines are to be used in cases where the "reasonable efforts" standard is to be applied. One need only review

cases cited by the majority to realize that there is substantial conflict among the various circuits in the definition and application of the "reasonable efforts" standard.

The Third Circuit apparently requires a far greater amount of diligence when reviewing the reasonable efforts standard. In United States v Jones, 492 F.2d 239 (3rd Cir. 1974), cited in the majority opinion, the Court of Appeals reversed defendants conviction for possession of heroin with intent to sell. The facts surrounding the arrest of Jones were similar to those involving the arrest of petitioners in that an informant was used to arrange a meeting between the defendant and the government agent. When it became apparent that the defense attorney would need to speak with the informant, which was not until the day of trial, the Government made efforts to locate the informant.

Specifically, a telephone call was made to the informant's residence in an attempt to discover his whereabouts; the next day two agents were sent to his presumed residence and later to his place of employment; the efforts to find the informant were unsuccessful. The trial judge held that the government had made reasonable efforts to make the witness available to the defense and the 3rd Circuit agreed that reasonable efforts were expended with respect to those two particular days. However, the Court reversed holding that:

> ". . . here, more was required. 492 F.2d at 241.

The Court went on to note:

> "if for legitimate reasons, the government decides not to identify the informant in advance of trial, then absent special circumstances it must take reasonable steps to have him available when the case is called, should the ruling in favor of disclosure be made. . .

> In this case the failure of the government to undertake a serious search for the informant in advance of the date set for trial has not be explained and hence in the circumstances here we do not consider that the obligation to produce the witness has been met."
> United States v Jones, supra at 242.

In the case at bar, there are even more compelling reasons to apply a more stringent standard of reasonableness where the informant is not a citizen of the United States and is the only witness who can substantiate the defense. Furthermore, an additional factor in the present case, which was not present in Jones is the fact that there was an already existing Court Order requiring the government to produce the informant Murrieta. This fact should also militate in favor of requiring a more stringent standard of reasonableness in this case as the Government was made fully aware, early in the case, that the presence of Murrieta was required.

Similarly, in another case cited by the majority, the First Circuit seems to follow a more stringent standard when a witness informant is unavailable to the defense. The Court in United States v Williams, 496 F.2d 378 (1st Cir. 1974) noted that the defendant made a decision not to press for the informer's presence, supra at 382. It is also important to note that the court, in affirming the conviction, stated as follows:

> "There is nothing in the record to show that the latter (the informants) were under government's control or influence at the time of the trial." Supra at 383.

The record herein indicates that Murrieta was subject to government influence at the time of the trial in that he was still in the employ of the United States Government. Furthermore, petitioners in this case consistently sought the opportunity to interview Murrieta and were repeatedly promised that he would be made available.

In yet another case cited by majority in support of their affirmance of the conviction of petitioners, the Fifth Circuit has given some indication that it may have ruled contrary to the Ninth Circuit. Specifically, United States v Tatum, 496 F. 2d 1282, 1284 (5th Cir. 1974) dealt with a situation where the informers in question were not beyond the subpoena power of the Federal Courts. Similar to the instant case, the government failed to produce the informers. However, unlike the holding of the 9th Circuit below, the Fifth Circuit, in Tatum, noted as follows:

> "We also rejects defendant's argument that the trial court erred in not granting a continuance, for, as we have noted, no motion for continuance was made. . ." (Emphasis added) 496 F.2d at 1284.

Implicit in the Fifth Circuit's holding is that if a motion to continue had been made it should have been granted. This implication stands squarely in opposition to the

Ninth Circuits holding that the petitioners were not entitled to a continuance under the circumstances.

Thus, there is substantial difference and conflict among the various circuit courts in what criteria should be utilized under the "reasonable efforts" standard. See, also, People v Goliday, 106 Cal. R. 113, 505 P.2d 537 (S.Ct., en banc, 1973). For this reason, this court should grant certiorari and review the present case.

III

THE APPLICATION OF THE "CLEARLY ERRONEOUS" RULE OF REVIEW BY THE NINTH CIRCUIT HEREIN WAS CLEARLY INAPPROPRIATE AND DENIED PETITIONERS THEIR RIGHT TO FULL AND COMPLETE APPELLATE REVIEW.

The majority opinion rendered on July 22, 1974, held that the review of petitioners' conviction was subject to the "clearly erroneous" rule under which appellate review is limited to determining whether a particular finding of fact is "clearly erroneous." Relying on the belief that the determination of the reasonableness of the Government's efforts in producing an informant is a question of fact, the majority concluded that the trial judges finding that reasonable efforts were employed in this case was not "clearly erroneous." Petitioners respectfully submit that the instant case was not a proper one for the application of the "clearly erroneous" rule and that by so applying said

rule, petitioners were denied their right to full and complete appellate review.

It is well settled that the "clearly erroneous" standard is only applied in review of findings which resolve disputed facts. Fleischmann Distilling Corp. v Maier Brewing Co., 314 F.2d 149 (9th Cir. 1963). In Fleischmann, the court went on to note:

> "When a finding is essentially one dealing with the effect of certain transactions or events, rather than a finding which resolves disputed facts, an appellate court is not bound by the rule that findings shall not be set aside, unless clearly erroneous, but is free to draw its own conclusions." (Emphasis added) 314 F.2d at 152 n.2, quoting with approval, Stevenot v Norberg 210 F.2d 615, 619 (9th Cir. 1954).

Clearly then, this rule of limited review has no application in cases where the disputed conclusion is one based on the application of a legal standard.

In the instant case, the district court had no occasion to resolve disputed

facts. Indeed, on the issue of the reasonableness of DEA's efforts to produce the informant Murrieta, the only evidence supplied came from Agent Lugo. Thus, there were no disputed facts to resolve. Accordingly, the "clearly erroneous" rule had no application in review of the district court's determination of whether DEA employed "all reasonable efforts: in attempting to produce Murrieta.

Furthermore, the "reasonable efforts" test is a legal standard and the determination of whether that standard has been complied with results in a legal conclusion. Of course, as Judge Hufstedler noted in dissent, the reasonable efforts tests is not a legal standard which exists separate and apart from all factual matters. However, merely because factual ingredients exist in this legal standard does not change the resolution of this legal question into a factual question. It seems clear that the resolution

of this legal question is not a proper subject for the application of the "clearly erroneous" rule under the mandate of Fleishmann Distilling Corp. v. Maier Brewing Co., supra.

For all the foregoing reasons, petitioners respectfully submit that the "clearly erroneous" rule was inapplicable to the instant case and that by applying said rule herein, petitioners were denied their right to full review of the determination of reasonableness made by the District Court.

CONCLUSION

The government in this case has attempted to absolve itself from any responsibility by its own, deliberate premeditated ignorance. The government's sins, both of omission and commission, have split the Ninth Circuit Court of Appeals asunder and driven the uneasy majority of that learned court to the misapplication of the "clearly erroneous" rule and to articulate rationalization in their effort to uphold the government in spite of the constitution.

For the foregoing reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Ninth Circuit in the instant action.

RESPECTFULLY SUBMITTED the 16th day of September, 1976.

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CERTIFICATE OF SERVICE

Counsel for the petitioners avow that they depostied in the United States Post Office in Tucson, Arizona, with first class postage prepaid, three (3) copies each of petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, to:

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DATED: September 16, 1976.

MICHAEL J. BROWN

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT DALE HART,

Appellant.

No. 74-3270

OPINION

UNITED STATES OF AMERICA,

Appellee,

v.

RUBEN MORALES ROBLES,

Appellant.

Apppeal from the United States

District Court

for the District of Arizona

Before: ELY and HUFSTEDLER, Circuit and CONTI* District Judge

HUFSTEDLER, Circuit Judge:

Hart and Robles appeal their convictions for distributing cocaine in violation of 21 U.S.C. § 841(a)(1). The appellants, who were tried separately, sold cocaine to government agents pursuant to arrangements made by paid informants. Their only defense was entrapment.

The appeal presents two questions. (1) Did the district court err in foreclosing Robles from raising the entrapment defense because he refused to take the stand and there to admit the offense? (2) Did the district court err in denying the appellants' respective motions to continue and,

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*Honorable Samuel Conti, Northern District of California, sitting by designation.

thereafter, to dismiss for failure of the Government to produce the informant Murrieta, who was a key figure in the sale and upon whom the appellants depended to prove their entrapment defenses? We answer both questions affirmatively and reverse the convictions.

Consideration of the first issue requires no discussion of the underlying facts. The district court ruled that Robles could not raise entrapment without taking the stand and admitting the offense, and it rejected Robles' countering offer of a statement in which he authorized his counsel to make a formal admission before the jury that he did the acts charged in the indictment. Robles' counsel raised the Fifth Amendment right not to incriminate oneself in defense of Robles' refusal to take the stand. The district court thereupon refused to permit Robles to raise entrapment and forbade his counsel from examining the Government's witness to whom

the sale was made about the role that the informant Murrieta played in bringing about the sale. The district court plainly erred in ruling that Robles had to admit the offense from the stand to enable him to raise the entrapment defense. The ruling is unsupported by authority in this circuit, it cannot be reconciled with the reasoning of Sorrels v United States (1932) 287 U.S. 435; Sherman v United States (1958) 356 U.S. 369; and United States v Russell (1973) 411 U.S. 423; and it creates serious constitutional problems.[1/]

Hart did not object to the court's ruling that he could not rely on the entrapment defense unless he took the stand and admitted the offense. He complied, and thereafter he gave testimony which, if credited

1/ The constitutional arguments with supporting authority are amply stated in Groot, "The Serpent Beguiled Me and I (without Scienter) Did Eat -- Denial of Crime and the Entrapment Defense," 1973 U. Ill.L.F. 254, 269-75.

would have supported a finding of non-predisposition and inducement by Murrieta. The court gave entrapment instructions, and the jury found him guilty.

In these cases we need not reach the troublesome questions about what must be conceded and how a concession may be made by means other than taking the stand when a defendant relies on entrapment because our disposition of the second issue forecloses retrail of both appellants.

Murrieta was the key figure in initiating the narcotics transaction, and he, along with his fellow informant, Borjorquez, participated in the negotiations that culminated in the sale of Special Agent Lugo, acting for the Drug Enforce ment Administration ("DEA"). Upon motions by the appellants, the district court on June 17, 1974, ordered the Government to produce Murrieta and Borjorquez for trial.

Pursuant to agreement of counsel, Borjorquez appeared for a recorded interview on July 25, 1974, in which he described his recruitment by Murrieta, supplied the address of a store owned by Murrieta in Mexico, and recited his and, in part, Murrieta's dealings with Agent Lugo. He was unable or unwilling to supply any of the critical details about Murrieta's conversations with Hart anteceding the sale itself. Borjorquez was not produced for pretrial or for trial. Murrieta never appeared at any time.

Murrieta and Borjorquez are both citizens and residents of Mexico. For about a year and a half before the Hart-Robles episode, DEA had used Murrieta's services as an informant. Agent Lugo had employed Murrieta in 16 different investigations during the period, 10 of which (including that involving Hart and Robles) were conducted

entirely within the United States. Murrieta owns a small store in Mexico. Borjorquez was a day laborer and field worker whose total annual earnings, aside from informing, were about $400. Neither informant was on a regular payroll. They were paid "rewards" for successful "investigations." DEA paid them nothing if their activities did not produce an arrest. If an arrest resulted, DEA increased their compensation proportionately to the amount of contraband seized. For their services in the Hart-Robles matter, Murrieta was paid $950, and Borjorquez was paid $350. Murrieta was regularly receiving very substantial payments for his informing activities. Borjorquez knew that a successful foray into the United States could and did yeild him almost as much money for a few days' work as he could earn at hard labor in a

a year in Mexico. The Government gave the informants no training and virtually no supervision. The informants were simply unleashed to set up drug and narcotics transactions in this country. Murrieta picked his own investigatory targets. When he wanted to report his activities, he telephoned Agent Lugo. Agent Lugo never initiated calls; indeed, he did not know their home telephone numbers, if any, or their home addresses. He did learn the address of Murrieta's store during the Borjorquez interview. He also knew that the informants regularly retreated to Mexico after an arrest. Agent Lugo saw the informants from time to time, including an occasion when Murrieta appeared to testify in another trial in May 1974, after Hart and Robles had been arrested. At that time, the Government knew that Murrieta would be a

material witness in a later prosecution of Hart and Robles.

We are aware of the critical role that informants play in the detection and apprehension of persons who are illegally trafficking in narcotics and controlled substances. The traffic is ugly, vicious, and dangerous, and informing in these cases is a perilous enterprise. We must also recognize that the use of paid informants entails great potential for abuse. "[A]n eager informer is exposed to temptations to produce as many accuseds as possible at the risk of trapping not merely an unwary criminal but sometimes an unwary innocent as well." (Velarde-Villarreal v. United States (9th Cir. 1965) 354 F.2d 9, 13.)

The Government's use of these informants in these cases presents grave danger of abuse. The reward system maximized temptation and control was minimal. The Government knew that the informant

were reluctant to testify and that they customarily returned to Mexico, outside the reach of process.

The Government argues that it should be excused from its failure to produce the informants because it exerted reasonable efforts to do so and it is not a guarantor of production. The Government's efforts to produce them were too modest;[2/] but even if it had tried harder, nonproduction cannot be excused under the circumstances of these cases

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2/ All that the Government did, acting through Lugo, was request the informants to appear and secure their promises to do so. These requests and promises occurred during a series of telephone conversations, initiated by the informants, concerning another investigation. The Agent continued to employ the informants and to accept their promises even after he knew that Murrieta had failed to appear when scheduled. The Government did not withhold rewards from them; it did not condition their continued employment on appearance; it did not detain them as material witnesses; it did not visit Murrieta's store to persuade him to appear and to offer him transportation from the store

When it cooses to act through paid Mexican inforamnts in investigations conducted entirely within the United States, the Government does become a "guarantor" pf tje appearance of informants ordered produced. Upon failure of the Government to produce the informants, the indictment must be dismissed. (Cf. United States v Tsutagawa, (9th Cir. 1974) 500 F.2d 420.) Only by requiring the Government to pay this cost for non-production can we adequately safeguard against "rewarded" alien informants entrapping the unwary innocent and assure defendants such as Hart and Robles a fair trial. (Cf. Velarde-Villarreal v United States, supra, 354 F.2d at 13,; United States v Walton (9th Cir. 1969) 411 F.2d 283.)

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to the courtroom. The agent did offer to drive them from Nogales to Tucson if they went to Nogales and called him. The informants did neither.

REVERSED AND REMANDED with instructions to dismiss the indictments.

CONTI, D.J:

I must respectfully dissent from the opinion of my colleagues. For reasons expressed more fully below, I do not believe a defendant can take advantage of the defense of entrapment without taking the stand and admitting every element of the crime nor that the government is a guarantor for the appearance of an agent allegedly responsible for entrapping the defendant.

As regards the district court's ruling that Robles had to admit the offense from the stand to enable him to raise the entrapment defense, I would affirm. My colleagues suggest that such a ruling is unsupported by authority in this circuit and is inconsistent with the reasoning of certain Supreme Court opinions. As the

issue herein presented is one of first impression, not only in this circuit, but apparently in other courts as well, it is not surprising that authority in support of the ruling is lacking. Contrary authority is also non-existent.

My reading of Sorrells v United States, 278 U.S. 435 (1932), is apparently at odds with that of the majority. The Sorrells court quite clearly indicated that a defendant who seeks to rely on the defense of entrapment must expect that his own conduct and predisposition will be subjected to a demanding examination.

> "... The predisposition and criminal design of the defendant are relevant. But the issues raised and the evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials. If there is the fact, common justice requires

> that the accused be permitted to prove it. The Goverment in such a case is in no position to object to evidence of the activities of its representatives in relation to the accused, and if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predispotition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense." (Emphasis added) Ibid. at 451-52. 1/

Appellant would have us believe that there is some sort of injustice in requiring him to take the stand to assert his

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1/ Language in Sherman v. United States, 356 U.S. 369 (1958) is to the same effect, and is perhaps even stronger. Therein the court, in an opinion by Cheif Justice Warren, stated:

> ". . . On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an 'appropriate and searching inquiry into his own conduct and predisposition' as bearing on his claim of innocence." Ibid. at 373.

entrapment and thereby expose himself to cross-examination. I see no injustice there. Quite the contrary, such a requirment is reasonable. If a defendant is to assert the defense of entrapment, he should not be allowed to merely hide behind a bold profession of lack of predisposition and criminal intent and thereby force the government to meet its burden of proof without subjecting himself to an attack on his credibility and a challenge to his possible perjury. The Sorrells language is clearly in accord.

My colleagues have suggested no way in which the searching inquiry apparently provided for by Sorrells and Sherman is to be accomplished unless the defendant asserting entrapment is required to take the stand.

The majority state that the district court's ruling is irreconcilable with the case of United States v Russell, 411 U.S. 423 (1973), as well as with Sorrells and Sherman. Unfortunately, the basis of the supposed irreconcilability is not made clear or even hinted at, and I can find no reasoning in those opinions which would compel me to reverse the district court's ruling. 2/

2/ My colleagues would also shy away from affirming the district court's ruling because it might create certain constitutional problems. My view of the possible constitutional complications is apparently more limited. Appellant asserts that the lower court's ruling infringes his Fifth Amendment right against self-incrimination. I cannot agree. The law is well settled in this circuit that a defendant must admit to committing all acts involved in the crime in order to assert the defense of entrapment. What remains to be protected then? The Constitution promises no protection which guarantees that a defendant's possible perjury (herein consisting at least

My colleagues would reverse the convictions of both Robles and Hart on the ground that the Government failed to produce at trial the purported entrapper Murrieta. I must disagree. The Government was not the guarantor for the appearnace of Murrieta, and it made reasonable efforts to procure his appearance. Even if it is conceded that the Government's failure to produce Murrietta consitituted error, it was not prejudicial as regards Robles, and the remedy afforded appellants is too extreme.

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of an implied, if not direct statement that he was entrapped into the criminal act) may go unchallenged. Assuming, arguendo, that the district court's ruling would raise constitutional problems, let us examine those problems and not merely reverse in order to avoid confrontation.

Although such prejudicial error would require reversal, the appellant should be subject to a new trial at which the Government would have the opportunity to produce Murretta; dismissal of the cases is not required.

I share the majority's concern for the abuse that may result from the use of informants. And I cannot dispute that the reward system under which Murrietta was working could increase temptation and the potential for abuse. However, even under the circumstances which were evidenced in the cases below, the Government does not become the "guarantor" for the appearance of an informant. The majority cites no authority for holding the Government to be a "guarantor", and none can be found. In fact, the recognized authorities are expressly to the contrary. Velarde-

Villarreal v United States, 354 F.2d 9 (9th Cir. 1965), the leading case in this circuit dealing with the Government's obligation to produce an informant, is cited by the majority to demonstrate the court's recognition of the evils that can attend the use of informants. The informant and alleged entrapper in that case was, as the counterpart in the case at bar, a Mexican whose return to Mexico after the arrest made him unavailable at trial. Notwithstanding such circumstances and other facts which make the Velarde-Villarreal case noticeably similar to the case at bar, the court in that case expressly rejected the proposition that the Government is the guarantor of an agent's appearance at trial:

> "....If it were made to appear that the Government, through reasonable effort, could have produced Margarito and yet failed to do so when defendant demanded such production, there should be a new

> trial. On the other hand, if the Government was actually unable by reasonable effort to produce him, we cannot hold that such inability would require a dismissal of the case, unless of course the Government itself purposely saw to it that Margarito disappeared, in the manner suggested hereafter. We know of no rule that the Government is under any general obligation to produce an informer.

The right of a defendant to have the testimony of such an informer, where the defense of entrapment is presented, is recognized in United States v White, 2 Cir., 324 F.2d 814, although the court in that case noted that 'Cases in this circuit and others have made it abundantly clear that the Government is not the guarantor of a special employee's appearance at trial'.

In United States v Clarke, D.C.E. D. Pa., 220 F. Supp. 905, 909, the court granted the defendant a new trial because it found the Government had not shown it had performed its 'duty to expend every reasonable effort to produce [the informer] at trial'. The defense there was entrapment. The court said: 'We think common fairness made it the Government's duty to produce Flores at the trial, or, failing that, to show

> that a reasonable efforts to produce him were fruitless'. Even in that case, which goes as far as any we can find in support of appellant's position here, the Government's duty is merely one of 'reasonable effort' to produce." Ibid. at 12. (Emphasis added).

Accord, United States v Pollard, 479 F.2d 310 (8th Cir. 1973).

It is thus evident that the majority has gone further than any other court in requiring the Government to produce an informant at trial. I have found no authority or acceptable rationale that calls for that extension of the law under any circumstances. Even assuming that certain special circumstances might justify such a result, the instant case certainly does not present such circumstances.

Applying the Valarde-Villarreal test of "reasonable efforts" to the case at bar, this court should affirm the findings of the district court that the Government had expended the requisite efforts and

should, therefore, not reverse the convictions on the basis of Murrietta's absence at trial. It must be remembered that the question of whether the test has been met is an issue of fact to be decided by the trial court. Velarde-Villarreal, supra, at 13. The trial court in the instant case held that the test was satisfied by the Government's efforts to produce Murrietta. And unless that finding is clearly contrary to the evidence before that court, we must affirm that finding.

In examining the record to determine what efforts were made by the Government to secure the presence of Murrietta at trial, it should first be noted that there was no evidence to support appellant's suggestion that the Government told Murrietta to secrete himself in Mexico and make himself unavailable as a witness. In fact,

the evidence is to the contrary. Murrietta had testified as a witness in an earlier case of a similar nature, and Special Agent Lugo, who had been involved in the arrests of appellants and who had been the Government's main contact with Murrietta, indicated under oath that he had informed Murrietta on numerous occasions that he was to make himself available as a witness for the trials of appellants. Appellants' statement that the Government did not know the informant's home address or phone number is similarly irrelevant. The Government knew where Murrietta worked, and appellants were given that information. This case is clearly not one in which the Government intentionally chose not to know how to contact an informant so as to justify its failure to make contact with and produce the potential witness. The record reveals that although

Special Agent Lugo had to rely on collect phone calls from the informants in order to have contact with them, the contact maintained was relatively frequent during the month preceding trial.

Between July 25, 1974, and the date of trial, approximately three weeks later, Lugo was in telephone contact with the informants on at least a dozen occasions, each time insisting on the importance of their attendance at trial. He was assured by them that they would be there. On the day before trial, Lugo insisted in no uncertain terms that Murrietta be present at trial and offered to pick him up at the border and drive him to the court to appear as a witness. Murrietta's appearance at trial was once again promised.

The above facts were before the trial court. Based upon them, the district

court found that the Government had "met the burden it must bear" and had "done everything reasonably necessary and proper that [it] could be required to do lawfully." It must be remembered that whether the Government has met its burden is a question of fact to be decided by the trial court, which decision is not to be reversed unless there is no foundation for it. The record obviously contains evidence which supports the trial court's finding below, and it should, therefore, be affirmed.

Even if I could accept the conclusion that the Government's efforts to produce Murrietta did not meet the "reasonable efforts" test or if I could convince myself to extend the law to made the Government the "Guarantor" of his appearance, I would still not be able to concur in my colleagues' dismissal of the cases. Faced with a similar situation, the Velarde Villarreal

court pointed out that, assuming the Government could not meet its burden, a new trial should be ordered, but that dismissal or acquittal would not be appropriate. 354 F. 2d at 13. I would agree, and consider the majority's remedy in the instant case to be unwarranted. The dismissal ordered by my colleagues is unnecessarily severe and seems particularly inappropriate where the dismissal is based upon a clear break in the state of the law. My colleagues' decision to hold the Government responsible as a "guarantor" takes a position previously and expressly rejected by this circuit in Velarde-Villarreal, and a position inconsistent with that expressed by any other circuit. To now punish the Government which followed the established state of the law, by dismissing the cases against Robles and Hart, rather than ordering a new trial at

which the Government would have an opportunity to follow the newly declared law and "guarantee" Murrietta's presence, is certainly excessive and unjust.

One final observation should be made in regard to the appeals here considered. The majority opinion treats the appeals of Robles and Hart as if both were subject to the same factual background. Such treatment is not only inaccurate, but for certain important reasons, dangerously misleading. The records of the trials reveal that Murrietta made contact with Hart and solicited the purchase of drugs from him. It was Hart who then of his own accord contacted Robles. To the extent that Murrietta employed any coercive influence to obtain the drugs, it is clear that all of those efforts were directed at Hart. Murrietta had no direct contact

with Robles until the time of the sale, and Robles has not even suggested any evidence which would indicate that Murrietta had any effect on his actions. For the entrapment defense to be available, the coercive enticement must come from an agent of the Government. As there is not even a hint of evidence to suggest that Robles was entrapped by Murrietta, the issue of entrapment did not exist as to Robles. The failure of Murrietta to appear at his trial is, therefore, of no consequence, and at most amounts to non-prejudicial error.

I would affirm both convictions for the reasons stated above, and assuming reversal was required, would at most order a new trial, rather than dismiss.

Appendix B

CAPTION OMITTED

PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

The appellee herein petitions for a rehearing and suggests that the rehearing be in banc, and the appellee hereby shows to this Court the following facts:

On May 1, 1975 this Court reversed the judgment of the Court below that the plaintiff was not the "Guarantor" of the appearances of an informant and that the defendant was not allowed to invoke the defense of entrapment unless he first took the stand and admitted the offense.

In addition this Court ordered the indictments as to these defendants dismissed by the District Court.

The ruling in the present case regarding the status of the Government as a "guarantor" of the production of an informant is directly in conflict with other decisions of this Court, namely, United States v Tsutagawa, (9th Cir., 1974) 500 F.2d 420, United States v Walton, (9th Cir, 1969) 411 F2d 282 and Velarde-Villareal v United States, (9th Cir., 1965) 354 F2d 9.

With regard to the requirement that the defendant take the stand and admit the offense before he may invoke the defense of entrapment the ruling in the present case directly conflicts with the decisions of the Supreme Court in United States v Russell, 411 U.S. 423 (1974), Sherman v United States, 356 U.S. 369 (1958) and Sorrells v United States, 287 U.S. 435 (1932).

Finally, it is submitted that the order dismissing the indictments in these cases is inappropriate in as much as it does not allow the Government an opportunity to follow the newly granted law and produce the informant at a new trial.

Petitioner respectfully requests that this Court grant the petition for a rehearing (and adopt the suggestion that the rehearing be en banc) and that the judgment of the District Court be, upon further consideration, affirmed.

Respectfully submitted,
WILLIAM C. SMITHERMAN
United States Attorney
(SIGNATURE)
James E. Mueller
Assistant United States
Attorney

CERTIFICATE OF COUNSEL

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and

entitled to favorable consideration of the court and that it is not filed for the purpose of delay.

WILLIAM C. SMITERMAN
United States Attorney
(SIGNATURE)
James E. Mueller
Assistant United States
Attorney

CERTIFICATE OF SERVICE

Two copies of the foregoing petition were mailed this 15th day of May, 1975, to:

MICHAEL J. BROWN
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ROBLES

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Attorney for Appellant
HART

———

Appendix C

(CAPTION OMITTED)

O R D E R

Before: CHAMBERS, KOELSCH, BROWNING DUNIWAY, ELY, HUFSTEDLER, WRIGHT, TRASK, CHOY, GOODWIN, WALLACE, SNEED, and KENNEDY, Circuit Judges

Upon the Government's Petition for Rehearing and Suggestion for Rehearing En Banc, and pursuant to a vote of the majority of the Court's judges now in active service, it is Ordered:

1. The opinion of the panel (Judges Ely and Hufstedler and the opinion of Judge Conti, District Judge, dissenting) are withdrawn. (Slip Opinion May 1, 1975).

2. The case is withdrawn from the panel.

3. The Suggestion for Rehearing En Banc is granted.

4. The parties will be hereafter notified whether oral arguments will be entertained, and, if so, at what time and place.

(SIGNATURE)
RICHARD CHAMBERS
CHIEF JUDGE

APPENDIX D

CAPTION OMITTED

OPINION

Appeal from the United States District Court for the District of Arizona.

Before: CHAMBERS, KOELSCH, BROWNING, DUNIWAY, ELY, HUFSTEDLER, WRIGHT, TRASK, CHOY, GOODWIN, WALLACE, SNEED, and KENNEDY, Circuit Judges

TRASK, Circuit Judge:

Hart and Robles appeal their convictions for distributing cocaine in violation of 21 U.S.C. §841(a)(1). The appellants, who were tried separately, sold cocaine to government agents pursuant to arrangement made by paid informants. Their only defense was entrapment.

The appeal presents two questions: (1) Did the district court err in denying the appellants' respective motions to continue for failure of the government to

produce the informant Murrieta, who was the key figure in the sale and upon whom the appellants depended to prove their entrapment defenses? (2) Did the district court err in foreclosing Robles from raising the entrapment defense because he refused to take the stand and there to admit the offense?

I

The court took this case en banc to determine whether the government was a "guarantor" of the presence of an informant at the trial of a case in which he had been used. We hold that it is not, and adhere to the rule that the government must use reasonable efforts to produce a government informant whose presence has been properly requested by the defendant. United States v Leon, 487 F.2d 389 (9th Cir. 1973); United States v Jenkins, 470 F.2d 1061 (9th Cir. 1972); Tapia-Corona v

United States, 369 F. 2d 366 (9th Cir. 1966); Velarde-Villarreal v United States, 354 F.2d 9 (9th Cir. 1965).

The record discloses the esential facts. The government availed itself of the services of two Mexican nationals in the development of the case against the appellants. Their names were Borjorquez and Murrieta. The arrest and the trial took place in Tucson and the court ordered that the government agent, Lugo, "make effort to locate informants and procure their presence at trial." Borjorquez was produced for interview on July 25 prior to the scheduled August 13 trial of appellant Hart to be followed immediately by the August 14 trial of Robles. He was questioned in the courtroom with the court interpreter assisting, and with the judge announcing his availability if required.

Borjorquez identified both himself and Murrieta as being residents of Magdalena, Sonora, Mexico. He further explained that Murrieta "has a little store, a general merchandise store" where he sells groceries and gave the street intersection where the store was located. He stated that Murrieta did not come for the interview "because he's ill and apparently in pain."

On August 12, a hearing was held on a motion to continue because Murrieta, who by then and developed as the only knowledgeable informer, had not appeared for interview or for trial. Sepcial Agent Charles Lugo of the Drug Enforcement Administration was questioned under oath. He testified that his contact had principally been by telephone conversations initiated by Murrieta or Borjorquez. He stated that he had talked to them at least a dozen times

between July 9 and August 12, telling them they would have to be present for the trial. He talked to them at least six times after Borjorquez had appeared for his interview on July 25. At no time did either indicate he would not be present. The last time he conversed with them was on Sunday, August 11, when they called from Santa Ana, Mexico. They assured him then, as they had before, that they would be in Tucson for pretrial interview on the following day, Monday, and for the trial on Tuesday.

At the conclusion of this evidentiary hearing on Monday the trial court denied the motion to continue with leave to renew it on Tuesday if Murrieta still had not appeared. On Tuesday, the day of trial, Murrieta had not arrived and a furthur hearing was held. Lugo told the court he had received a telephone call from Borjorquez after he returned to his office

on Monday following the evidentiary hearing. Lugo related he had told Borjorquez in very strong terms to get Murrieta and come to Tucson at once. He also told them to call him from Nogales, at the border, and that he (Lugo) would pick them up and drive them to Tucson. He had received no further word.

Lugo also amplified his testimony regarding employment of informants by explaining that when they are "first documented as informants" they are advised that the DEA requires that if they parricipate in a case in any way and are asked to testify they must be present to testify. "That's one of the requirements for informants."[1/] He further stated that to his knowledge neither had been in the United States and available to subpoena, since the Borjorquez interview on July 25. On one occasion he had sent $20 to them to come up but they

had not done so. The court denied the motion for a continuance and the motion to dismiss as to each defendant.[2/]

It was suggested at oral argument that Murrieta could have been "detained" as a material witness when he appeared and testified for the government as an informant in a case in mid-May of the same year that was tried in the United States District Court in Tucson. This is probably correct. See United States v. Verduzco-Macias, 463 F.2d 105 (9th Cir. 1972); Bacon v United States, 449 F.2d 933 (9th Cir. 1971). At least some inducement such as retention of a portion of the reward until the case was closed, could have been made. But this case is not akin to Bacon or Verduzco-Macias. There the putative witnesses were fugitives; they had not only shown a disinclination to cooperate but the Mexican aliens were subject to possible imprisonment

should the government have wished to indict and prosecute. Every self-interest was on the side of their fleeing the jurisdiction. Here, Murrieta up to that mid-May (the date of his last physical presence in the United States) had always been cooperative. He had promised to testify in court in May in a narcotics case and had appeared and testified as he had promised. He had not at that time refused to cooperate in any respect so far as the record shows. Neither had he failed to keep any commitment to testify. Had he been taken into custody at that time when there was no apparent reason to distrust him, he might well have been a very unhappy witness to be kept away from his home, his family and his business from mid-May until mid-August. It was also argued that the government might have withheld a portion of his reward. Again, he

had presumably been paid before and had still cooperated. Under the Department's requirements to be available to testify he still risked the loss of future rewards if he failed to appear when requested. Was there any reason as a matter of foresight for Lugo to believe that this case was different?

The dissent acknowledges that the government must only use reasonable efforts to produce the informant. Part of the difference between the majority rationale and the dissent is the point at which "reasonable effort" is to be judged. We believe it to be as of the time the government is exerting its efforts to obtain the attendance of the witness, taking into consideration the background of performance and attitude of the desired witness as of that time. That would ordinarily be after the trial date had been established

and as the case was progressing to the actual finalized trial date. At the time Murrieta was last in the United States as far as the evidence shows, (mid-May before the August 13 trial date) the trial date had not been established finally. Certainly as of that time there was no reason to suspect that future performance would be any less than the 100 percent performance of the past.

After Murrieta had returned to Mexico there was nothing to do but to accept his promises as given with the expectation that he would fulfill them, together with the inducements of expense money and travel assistance. As of now the record is, of course, silent as to whether Murrieta was on his way, met with accident, remained ill or otherwise unable to fulfill his promise or whether he was simply recalcitrant. Just as ex

post facto verification of the correctness of a tip from an informer by discovery of the contraband does not justify a finding of probable cause based upon the tip alone, United States v Moreno-Buelna, 524 F.2d 1129, 1133 (9th Cir. 1975), (Hufstedler, J., dissenting), so, too, in this case, the view from perfect hindsight disclosing that an informer did not in fact show up for a trial, does not thereby establish conclusively that there was no reasonable effort made to produce him, or by him to appear.

All of which brings us to the all important consideration of the function of the trial judge at this point and the effect of his determination. His finding was that the government had met its burden. "They've done everything reasonably necessary and proper that they could be requried

to do lawfully, to get these witnesses here." The trial court had held two evidentiary hearings before making this determination. We hold that the trial Court's finding should be sustained unless clearly erroneous and that it was not clearly erroneous under these circumstances.

This court sitting en banc held in United States v Page, 302 F.2d 81 (1962), that the clearly erroneous rule applied in criminal cases by analogy to Rule 52(a), Fed. R. Civ. P., when the trial court rules upon the admissibility of evidence in the face of a motion to suppress. The motion to suppress was based upon the contention that a consent to search had not been validly given. This court decided in Page that it was for the trial court to determine given certain facts, whether consent had been given in form and whether that consent was "valid" else it was no legal consent.

In Robles and Hart the court hears certain facts and must determine whether the government did everything "reasonably necessary" to obey its order to produce an informant. In Page we held that the question was one of fact and was governed by the "clearly erroneous" rule. Our view is that the same rule applies here.[3/]

In each case the responsibility of the trial court could be argued to involve a mixed question of fact and of law -- in the case at bench, "reasonably necessary" versus the case in Page "no duress or coercion, express or implied" and "freely and intelligently given."[4/] This court in cases subsequent to Page has adhered to the rule that questions of fact (even where arguably mixed with law) in criminal matters are governed by the clearly erroneous rule.[5/] Other jurisdictions have applied the same test, some without considering the fact that Rule 52(a) Fed. R. Civ. P. only applies directly to civil cases.[6/]

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Nor can it be convincingly established that the pretrial ruling was a "conclusion of law" and therefore not subject to the clearly erroneous rule. The cases cited in notes 5 and 6, supra, which applied the clearly erroneous rule, could all arguably be considered to involve a question of law as well as a finding of fact. In Lundgren v Freeman, 307 F.2d 104 (9th Cir. 1962), we discussed the distinction between findings of fact to which the clearly erroneous rule applied and, borrowing from Commissioner v Duberstein, 363 U.S. 278 (1960), decided that "[a] finding of fact to which the clearly erroneous rule applies, is a finding based on the 'fact-finding tribunal's experience with the mainsprings of

human conduct'." Lundgren v Freeman, supra at 115. In Velarde-Villarreal v United States, 354 F.2d 9, 13 (9th Cir. 1965), the very issue was decided by this court: "We think whether there was a failure to expend every reasonable effort to obtain the witness is a question of fact for the trial judge." Here, the trial court had before him the agent who was responsible for Murrieta's presence at the pretrial and trial proceedings. As a "border court" the judge was familiar with the problems of obtaining Mexican aliens to testify and the means which could be said to be reasonable or lack reasonableness to obtain their testimony. He held two evidentiary hearings to assure himself that reasonable efforts had been made. It was for him to measure the quality of the effort and the sincerity of the

officer's words and actions.[7]

Other circuits faced with the same problem have not gone beyond the "reasonable effort" standard.[8] None has been found which has required that the government "guarantee" or "insure" the presence of the witness and we decline to do so here. That this informer lives south of the border does not alter our conclusion. An informer can go underground in New York City, Chicago or Los Angeles and be just as unavailable for pretrial or trial, and the same rules should and do apply. The informants here went back to Mexico because it was where he lived and where Murrita had his store and Borjorquez earned his small livelihood.[9]

In sum, we are unable to say that the finding of the trial court that the government used reasonable efforts to

produce these informants was clearly erroneous. It must be remembered that it was the trial court which heard testimony or direct and cross-examination at two evidentiary hearings; that it was the trial court which observed the demeanor of the witnesses; and most importantly that it was the trial court which considered the options available to the agent at the time he made his decision and measured the reasonableness of the agent's actions against the facts and options available to him at that time.[10/] It is not our role as an appellate court to try this case de novo.

The decision of the trial court that the government did exert reasonable efforts to produce the informers, is affirmed, and appellants' motion to continue was thus properly denied.

II[11/]

In requiring Robles to admit the offense as a condition to his asserting entrapment, the district court relied on the Eastman line of cases that we overruled in United States v Demma, 523 F.2d 981 (9th Cir., en banc, 1975). Demma applies to Robles whose appeal was pending when Demma came down. None of the doctrines that have been developed to limit the retrospective effect of new rules of law upon pending cases has any application to Demma. That decision announced no new rule of law; it did not represent any "sharp break in the web of the law" (Milton v Wainwright, 407 U.S. 371, 381 n.2 (1972) (Stewart, J. dissenting). Indeed, Demma, mended a break in the law caused by the aberrational Eastman cases and its spawn and reconciled the law of our Circuit with Sorrells v

United States, 287 U.S. 435 (1932); Sherman v United States, 356 U.S. 369 (1958), and United States v Russell,411 U.S. 423 (1973). The special retroactivity doctrines affecting the exclusionary rule stated in United States v Peltier, 422 U.S. 531 (1975), are irrelevant. Equally remote from the Demma context are those cases that have given limited retrospective application to new prophylactic procedural rules, for example, Halliday v. United States, 394 U.S. 831 (1969), holding that McCarthy v United States, 394 U.S. 459 (1969), was not retroactive to guilty pleas taken before McCarthy was decided. The Eastman error is grounds for reversing Robles' conviction.

Upon remand, the defendants and the government will have the opportunity to present the issues in the light of the

factual and legal developments that have occurred since these cases were tried.

As to defendant Hart, the judgment of the court below is affirmed. As to defendant Robles, the judgment is reversed and remanded for proceedings not inconsistent with this opinion.

Footnote 1 (Reference ivl)

"THE WITNESS: When they were first documented as informants, they were advised that the procedure of the Drug Enforcement Administration, one of them is that if they participate in any way or conduct any introductions and we ask them to come to court, or the defense requests them to come to court, to testify on behalf of the Government, that they will be present to testify. That's one of the requirements for informants.

"Q. BY MR. KNAUSS: Is that done as a matter of standard procedure in your agency?

"A. Yes, sir, it is, sir.

"Q. Did you do it yourself personally?

"A. Yes, sir.

"Q. Is this done with both Mr. Borjorques and Mr. Murrieta?

"A. Yes, sir, I did.

"Q. Did you remind them of that procedure during any of your calls that have told us about?

"A. Yes, sir. But it was indirectly referring to the other case that they had been up here before on. And I told them, that, well, I know they didn't like the idea of testifying, but I told them that regardless of whether or not they liked it or not, anytime they did a case and they got paid by the Government for doing it, that they were part of the case and they were required to testify, they would have to testify." R.T. Vol. 4 at 36-37.

Footnote 2 (Reference page ivli)

"It appears to me that the Government has met the burden that they must bear. They've done everything required to do lawfully, legally to get these witnesses here. The defendants have a little obligation themselves. They've known who these witnesses are, and have known basically where they are. They were--had an opportunity to interview one of them for three hours or better. I think we've bent over backwards for the defendants in this case and have given them far more latitude than I know of any case that says we must give a defendant under the circumstances." R.T. Vol. 4 at 42.

Footnote 3 (Reference page ivlvii)

Said this court in Page at 83:

"The government must prove that consent was given. It must show that there was no duress or coercion, express or implied. The consent must be 'unequivocal and specific' and 'freely and intelligently given.' There must be convincing evidence that defendant has waived his rights. There must be clear and positive testimony. . . ."

Footnote 4 (Reference page ivlvii)

In Page the trial court's finding was reversed but because the trial court mistakenly assumed that as a matter of law because of a prior ruling, he was obliged to make the ruling that he did.

Footnote 5 (Reference page ivlvii)

E.g., United States v Trice, 476 F. 2d 89 (9th Cir. 1973) (finding corroboration of informant's testimony sufficient not clearly erroneous); Mc Kinney v United States, 487 F.2d 948 (9th Cir. 1973) (finding that a defendant had not met burden of proof of incompetency to stand trial not clearly erroneous); Costello v United States, 324 F.2d 260 (9th Cir. 1963) (clearly erroneous rule applied in considering whether evidence sustained finding that officers who arrested defendant acted upon probable cause).

Footnote 6 (Reference page ivlvii)

E.g., United States v Jones, 475 F.2d 723 (5th Cir. 1973) (Whether defendant's statement as to where stolen money was hidden was voluntary judged by clearly erroneous test); United States v Conner, 478 F.2d 1320 (7th Cir. 1973) (whether facts disclosed constituted reasonable grounds for arrest without warrant measured by clearly erroneous standard). See also 9 Wright & Miller, Federal Practice and Procedure, ¶ 2573, at 689 (1971 ed.); Leon v United States, 382 F.2d 232, 234 (8th Cir. 1967).

Footnote 7 (Reference page ivlix)

The dissent states in support of an innuendo of a lack of due process that "Neither is it simple to decide whether the Government has participated, by 'suggestion, procurement, or negligence' in the unavailability of a witness, which is a denial of due process (United States v Mendez-Rodriquez (9th Cir. 1971), 450 F.2d 1, 5; United States v Tsutagawa (9th Cir. 1974), 500 F.2d 420), and a failure to use reasonable efforts to produce a government informant whose departure was aided by his reward money, which only potentially leads to a dismissal of an indictment." (Emphasis added.) The insinuation that the government has "participated" in the absence of the witneses is not supported by any evidence in the record and the trial court so found.

Footnote 8 (Reference page ivlix)

Unites States v Williams, 496 F.2d 378, 382 (1st Cir. 1974); United States v Super, 492 F.2d 319, 321 (2d Cir. 1974); United States v Jones, 492 F.2d 239, 242 (3rd Cir. 1974); United States v Tatum, 496 F.2d 1282, 1284 (5th Cir. 1974); United States v Canster, 419 F.2d 942, 954 (7th Cir.), cert. denied, 397 U.S. 1029 (1970).

This circuit has followed Page a half dozen times and as recently as United States v Townsend, 510 F.2d 1145, 1147 (1975). Other Ninth Circuit cases are: United States v Chase, 503 F.2d 571, 572 n.3 (1974); United States v Agosto, 502 F.2d 612, 514 (1974); United States v Phelps, 490 F.2d 644, 646 (1974); United States v Roghman, 492 F.2d 1260, 1264 (1973) United States v Marshall, 488 F.2d 1169, 1186 (1973). Page has been followd by the Sixth Circuit, United States v Gargotta, 510 F.2d 409, 411 (1974); by the D.C. Circuit, Jackson v United States, 353 F.2d 862, 865 n.4 (1965); and by the Tenth Circuit, Martinez v United States, 333 F.2d 405, 407 (1964).

Footnote 9 (Reference page ivlix)

The dissent implies that the payment of the reward financed or "assured them adequate funds" to return to Mexico . There is no evidence to support such a suggestion. A hold out of payment due them would have created an inducement. There is not evidence that it would have accomplished its purpose.

Footnote 10 (Reference page 1)

We note that the options available to the government to pay or not to pay the informants and to detain or not to detain Murrieta were all made prior to any record of broken promises. There was never any indication that the government participated, by suggestion or by procurement, in the unavailability of the witness.

Footnote 11 (Reference page 1i)

This portion of the opinion was prepared by Judge Hufstedler for an earlier draft and is used with her permission, having met the approval of a majority of the Court.

UNITED STATES v HART - No. 74-3001
UNITED STATES v ROBLES- No. 74-3270

DUNIWAY, Circuit Judge (Concurring and dissenting):

Like Judge Hufstedler, I concur in Part II of Judge Trask's majoirity opinion. In all other respects, save one, I join in Judge Hufstedler's dissent. I differ with Judge Hufstedler in her view that the question before us is a question of law. I think that Judge Trask is right in saying that the question is whether the court's finding that the government used the required reasonable efforts to produce the informants is clearly erroneous. Unlike Judge Trask, however, and like Judge Hufstedler, I am convinced that the findings is, in these cases, clearly erroneous, for the reasons stated by Judge Hufstedler in also concluding that there was error as a matter of law. I am "left with the definite and firm conviction that a mistake has been

committed." United States v United States Gypsum Co., 1948, 333 U.S. 364, 395.

Therefore, I concur, except in this one respect, in Judge Hufstedler's dissent.

UNITED STATES v HART, ROBLES - Nos. 74-3001/3270

ELY, Circuit Judge (Concurring and Dissenting):

I concur in my Sister Hufstedler's opinion, based, as it is, on the solid precedential authorities of our court. I would go farther, however, since I adhere to the views that I long ago expressed in Velarde-Villarreal v United States, 354 F.2d 9 (9th Cir. 1965), particularly in the last two paragraphs thereof at pages 15 and 16.

SIGNATURE
W. ELY
CIRCUIT JUDGE

United States v Hart and Robles-
74-3001/3270 - EN BANC

HUFSTEDLER, Circuit Judge, concurring and dissenting:

I concur in Part II of the majority opinion holding the United States v Demma (9th Cir. en banc 1975) 523 F. 2d 981 is retroactive, and reversing Robles' conviction. I dissent from the remainder of the opinion.

The majority opinion places the activities of the Government and those of the informants in a more benign light than is warranted under all of the circumstances. As the Government knew all along, Murrieta and Borjorquez are both citizens and residents of Mexico. For about a year and a half before the Hart-Robles episode, DEA had used Murrieta's services as an informant. Agent Lugo had employed Murrieta in 16 different investigations during the period

10 of which (including that involving Hart and Robles) were conducted entirely within the United States. Murrieta owns a small store in Mexico. Borjorquez was a day laborer and field worker whose total annual earnings, aside from informing, were about $400. Neither informant was on a regular payroll. They were paid "rewards" for successful "investigations." DEA paid them nothing if their activities did not produce an arrest. If an arrest resulted, DEA increased their compensation proportionately to the amount of contraband seized. For their services in the Hart-Robles matter, Murrieta was paid $950, and Borjorquez was paid $350. Murrieta was regularly receiving very substantial payments for his informing activities. Borjorquez knew that a successful foray into the United States could

and did yield him almost as much money for a few days' work as he could earn at hard labor in a year in Mexico. The Government gave the informants no training and virtually no supervision. The informants were simply unleashed to set up drug and narcotics transactions in this country. Murrieta picked his own investigatory targets. When he wanted to report his activities, he telephoned Agent Lugo. Agent Lugo never initiated calls; indeed, he did not know their home telephone numbers if any, or their home addresses. He did learn the address of Murrieta's store during the Borjorquez interview. He also knew that the informants regularly retreated to Mexico after an arrest. Agent Lugo saw the informants from time to time, including an occasion when Murrieta appeared to testify in another trial in May 1974, after Hart and

Robles had been arrested. At that time, the Government knew that Murrieta would be a material witness in a later prosecution of Hart and Robles.

The Government's use of these alien bounty hunters created grave dangers of abuse. These informants had neither knowledge of legal limitations upon the conduct of American law enforcement personnel nor any motivation to respect the rights of those whom they chose as targets. The reward system maximized the "temptations to produce as many accuseds as possible at the risk of trapping not merely an unwary criminal but sometimes an unwary innocent as well." (Velarde-Villarreal v United States (9th Cir. 1965) 354 F.2d 9, 13.) "[S]ince the Government chooses to utilize such agents, which the attendant risk of entrapment, it is fair to require the Government which uses this inherently

dangerous procedure to take appropriate precautions to insure that no innocent man should be punished." (Id.) We thereupon imposed on the Government the burden of proving that it used reasonable efforts to produce a Government informant whose presence has been appropriately requested by a defendant.

A.

The clearly erroneous standard standard of review does not apply to our determination of the question whether the district court correctly applied the reasonable efforts test to the undisputed facts, but, even if the standard were applicable, the district court's decision should be reversed.

The district court did not make any factual findings, and there was no occasion for them. Assuming, as we do, that the court believed Agent Lugo's testimony,

no factual issues were presented for the court to resolve. Our court has held repeatedly that the clearly erroneous standard is irrelevant to a conclusion based on the application of a legal standard, even if that conclusion is labeled a finding of fact. "When a finding is essentially one dealing with the effect of certain transactions or events, rather than a finding which resolves disputed facts, an appellate court is not bound by the rule that findings shall not be set aside, unless clearly erroneous, but is free to draw its own conclusions." (Fleischmann Distilling Corp. v. Maier Brewing Co. (19th Cir. 1963) 314 F.2d 149, 152 n.2, Quoting with approval Stevenot v Norberg (9th Cir. 1954) 210 F.2d 615, 619. Accord: Lungren v Freeman (9th Cir. 1962) 307 F.2d 104, 115 (collecting numerous cases.).)[1/]

To be sure, the reasonable efforts test is not a legal concept that is drained of all factual essences. Conduct cannot be deemd reasonable or unreasonable in a factual vacuum. Conduct that is reasonable under some circumstances is wholly unreasonable under others. Reasonableness rules have developed in many areas of the law in recognition that per se rules are often unworkable, and, even if they are workable, they would tend to defeant the very purposes of the law that they were intended to implement, or they

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1/ These are civil cases, but no reason exists to apply a more restrictive standard of appellate review to criminal cases. On the contrary, a respectable argument can be made that deeper, rather than shallower appellate scrutiny should be given to criminal cases because the societal and personal stakes in criminal cases are often larger than in civil cases.

would produce results that would be generally perceived as unjust or downright foolish. For example, we would not attempt to justify a rule that a reasonable time to perform a contract is always ten days.

The existence of factual ingredients in the legal mix does not transmute the application of this legal standard into factual question. Our obligation to inquire into the propriety of the district court's application of the reasonable efforts test is akin to the inquiry that we constantly make into the sufficiency of evidence to sustain a finding or a judgment. After giving the trier of fact all of the intendments that are the trier's due, we must confront the legal question of sufficiency of the evidence or reasonableness of the Government's efforts without the novocaine of the clearly erroneous rule. It is no

more possible to state a precise formula for measuring this kind of legal error than it is to produce an encompassing definition of what is reasonable under the circumstances. The components of the district court's conclusion are a blend of factual determinations and decisions on issues of law. Even questions of the relevance of evidence combine facts with law. Consideration of steps that the Government could have but did not take is as relevant to the reasonableness decision as is consideration of the steps the Government did take. But the availability of alternatives hinges on questions of law as well as of fact, and questions of policy as well as interpretation of precedents.

The majority's view that the Government carried its burden of proving that it used reasonable efforts to produce these

informants reduces that burden to feather lightness. "Reasonable efforts" in this case is diminished to "try a little." That result cannot be squared with the concerns that engendered the rule. The rule was created to minimize the risk of entrapment that "this inherently dangerous procedure" produces and to minimize the risk that unbridled governmental zeal will trench upon a defendant's constitutionally guaranteed right to a fair trial. The line between creating opportunities for criminally disposed persons to follow their bent and entrapping the unwary innocent is not easily drawn. Neither is it simple to decide whether the Government has participated, by "suggestion, procurement, or negligence," in the unavailability of a witness, which is a denial of due process (United States v Mendez-Rodriquez (9th Cir. 1971) 450 F.2d 1, 5; United States v

Tsutagawa (9th Cir. 1974) 500 F.2d 420), and a failure to use reasonable efforts to produce a government informant whose departure was aided by his reward money, which only potentially leads to a dismissal of an indictment. I cannot contenance any lightening of the Government's burden of proving reasonable efforts in terrain as ringed as this is with the dangers of entrapment and of due process deprivation. The Government failed to carry its reasonable efforts burden in these cases.

B

I could not join the majority opinion even if I thought that the clearly erroneous standard was a-propriate. As Judge Learned Hand observed: "It is idle to try to define the meaning of the phrase 'clealy erroneous'; all that can be profitably said is that an appellate court,

though it will hesitate less to reverse the finding of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded." United States v Aluminum Co. (2d Cir. 1945) 148 F.2d 416, 433. See also 5A Moore's Federal Practice (1975 ed.) ¶ 52.03[1], pp. 2613-2627.)

I am well persuaded that the evidence was insufficient to establish that the Government's efforts were reasonable under the circumstances. The only efforts that the Government made to produce the informants were those of Agent Lugo. In several telephone conversations initiated by the informants, he asked them to appear, and one or both of them promised to do so. He also offered to drive them from Nogales to Tucson, if they would leave

Mexico, travel to Nogales, and call him. They did not comply. He relied on their promises to appear made during his telephone convesations with them even after Murrieta broke his earlier promise to attend a scheduled pretrial interview. Although the Government knew that both were potential material witnesses and that Murrieta was a key witness, it paid them in full for the Hart-Robles set-up and continued to employ them for other investigations. Although Murrieta and Borjorquez were cooperative in the bounty hunting phase of their activities, the Government knew that they were reluctant to be witnesses. Murrieta had appeared once in a different case; he never made any appearance in the Hart-Robles cases and repeatedly broke his promises to do so. Borjorquez never testified in any case, but he did appear for one interview. He

too, repeatedly broke his promises to Agent Lugo. The Government also knew that both informants regularly left the country and could not then be reached by process. Despite that knowledge, the Government did not detain them as material witnesses, nor did it arrange to take their testimony by deposition. (18 U.S.C. § 3149; Rule 46(b)) Fed. R. Crim. P.; United States v Verduzco-Macias (9th Cir. 1972) 463 F.2d 105; Bacon V. United States , (9th Cir. 1971) 449 F.2d 933.) It did not withhold their pay. (Contrast United States v Verduzco-Macias, supra.) On the contrary the Government paid them in full, thus assuring them adequate funds to arrange their own transportation to Mexico.

Accordingly, I would reverse both convictions and remand the cases to the district court for further proceedings

consistent with the views herein expressed.

Circuit Judges Koelsch, Browning and Kennedy concur in Judge Hufstedler's concurring and dissenting opinion. Circuit Judge Ely concurs in Judge Hufstedler's opinion and files a separate opinion. Judge Duniway concurs in part B of Judge Hufstedler's concurring and dissenting opinion, and files a separate opinion.

APPENDIX E

CAPTION OMITTED

On Appeal from the Judgment
of the United States District Court
For the District of Arizona

MOTION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

PREPARED BY MICHAEL J. BROWN, P.C.
222 North Court Avenue
Tucson, Arizona 85701
Attorney for Appellant

(TABLE OF CONTENTS OMITTED)

AUTHORITIES:

Fifth Amendment to the United States Constitution

Sixth Amendment to the United States Constitution

SUGGESTION FOR REHEARING EN BANC

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

COME NOW the appellant and suggests that it would be appropriate for this matter to be heard en banc, since the decision was rendered en banc.

RESPECTFULLY SUBMITTED this 3rd day of August, 1976.

MICHAEL J. BROWN, P.C.
Attorney at Law
222 North Court Avenue
Tucson, Arizona 85701

(SIGNATURE)
Attorney for Appellant

MOTION FOR REHEARING AND MEMORANDUM

COMES NOW the appellant, RUBEN MORALES ROBLES, by his attorney, MICHAEL J. BROWN, P.C., and respectfully petitions this Honorable Court for a rehearing of the above case for the following reasons and upon the following grounds:

The "reasonable efforts" rule adopted by both the majority and the minority seems a fair standard by which to judge the government's effrots in the production of an informer. However, the combination of the "reasonable efforts" standards with the "clearly erroneous" rule and the refusal of the majority to look at the totality of the government's conduct with respect to the informant

makes the application of the "reasonable efforts' rule a farce.

The Court states that the same rules should apply whether the informer is an alien or a citizen, and if the rule is a searching ad hoc inquiry of each specific set of facts as to whether or not the government's conduct has been reasonable, then counsel would agree. However, the majority seems to have treated this situation not as if there was a difference in the rule, but as if there were no difference in the facts; for example, between an informer living in Mexico and an informer living in Los Angeles. What if the informer lived in Vladivostok? Certainly his use as an informer in this case would be just as reasonable as the use of Murrieta.

To narrow the inquiry to the efforts made by the Government at the time it is forced to make those efforts without taking

into consideration all of the government's action and inaction with respect to the informant is at best sophistry. The facts are that the DEA hired Murrieta as an informer a year and a half before Robles was arrested. At the time he was hired, he was a Mexican citizen and national, living sixty-five (65) miles south of the United States border in the town of Magdalena, Sonora, Mexico, and he continued to live there up to and including the date of Robles' trial. At the time he was hired by the Government of the United States, the Government did not ask for or obtain his address or telephone number, and that factual situation continued through the date of Robles' trial. At the time Murrieta was hired, the Government knew that there was no way that they could get hold of him unless Murrieta initiated the contact. During the period of time that Murrieta was

employed up to the Robles trial, he was used in sixteen (16) cases, ten (10) of which originated in and were wholly confined to Pima County, Arizona. The record is clear that upon completion of a case, he was paid in full and immediately returned to his residence in Mexico.

Either the case agent dealing with Murrieta and the agents who hired him were terribly incompetent, or they deliberately did not want any information that would assist them or a defense attorney in locating Murrieta. Counsel does not believe it proper to assume that the agents are all incompetent; therefore if they did not possess information which any reasonably prudent police officer would have, it is because they deliberately did not want to have, it is because they deliberately did not want to have the information; such is the case here. The Government had deliber-

ately avoided obtaining information that would assist in locating the Government informer. The majority opinion completely ignores this conduct on the part of the Government and allows the substitution of the Government's smirking ignorance for the defendant's rights under the Fifth and Sixth Amendments of the United States Constitution. The Government's conduct may not have been active participation in the absence of the witness; it is just that they have done everything in their power to avoid being able to produce the witness: A rose by any other name. . . The Government deliberately placed itself in a position that they now complain of. Is this Court going to allow them to say, "We couldn't do anything else," when the reason they could not do anything else, if such be the case, is their own deliberate conduct.

The majority states that there is no evidence that a hold-out of payment to these informers would have assured their presence at the trial; it would, however, have been an inducement and it would have indicated some effort on the part of the Government to obtain the informers' presence.

The trial court indicated in the trial transcript, page 28, footnote No. 2, that "the defendants have a little obligation themselves. They have known who these witnesses were, and have known basically where they were. Counsel was convinced up until that quote appeared in the majority opinion, that the trial Court's mention of it was specious. Defendants were able to discover, on July 25, 1974, that Murrieta lived in Magdalena, Mexico, and ran a little store at or near a certain intersection. The terms of defendants' re-

lease, under bond, strangely enough, did not allow them to journey into Mexico.' As was pointed out at the interview of the witness in July, both of the informers spoke only Spanish; the defense attorneys only English. The defense attorneys were not acquainted with the informer Murrieta and did not know what he looked like. When the defense attorney attempted to obtain more information concerning the whereabouts of Murrieta, he was prevented from doing so by the United States Attorney. (Interview of Witness, p.59, ln. 17 to p. 60 ln.5.) Neither the defendants nor their attorneys have agents stationed in Mexico like the DEA. To suggest, under the circumstances, that there was any way that the defendant could have obtained Murrieta's presence at trial is just incredible.

If the trial Court's finding was not clearly erroneous. The Government's

efforts were not only not reasonable, they were nonexistent, and they are exactly the kind of efforts the Government planned to make when they hired Murrieta a year and a half beforehand.

CONCLUSION

Counsel respectfully request that this Court grant the rehearing requested herein since it is the sincere belief of counsel that the majority opinion, as presently constituted, is mistaken and will open the door for even more flagrant abuse of the informer system by the Government.

RESPECTFULLY SUBMITTED this 3rd day of August, 1976.

MICHAEL J. BORWN, P.C.
Attorney at Law
222 North Court Avenue
Tucson, Arizona 85701
(SIGNATURE)
Attorney for Appellant

ADOPTION BY REFERENCE

The appellant, RUBEN MORALES ROBLES, hereby adopts by reference, as his own, as if fully set forth herein all of the issues and arguments presented by the appellant ROBERT DALE HART in his Motion for Rehearing previously filed herein.

CERTIFICATE OF SERVICE

I, Michael J. Brown, hereby certify that I mailed two copies of this Motion for Rehearing and Suggestion for Rehearing En Banc this 3rd day of August, 1976, to:

HON. WILLIAM C. SMITHERMAN
UNITED STATES ATTORNEY
POST OFFICE BOX 1951

and

LOUIS L. DECKTER
LAW OFFICES OF
JACK A. ETTINGER, P.C.
111 South Church Avenue
TUCSON, ARIZONA 85701

Dated: August 3, 1976.

(SIGNATURE)

Appendix F

CAPTION OMITTED

PETITION FOR REHEARING

COMES NOW Appellant, ROBERT DALE HART, by and through his attorneys, and petitions this Court, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, for a rehearing of the decision of this Court from its opinion of the above entitled and captioned matter of July 22, 1976, for the reasons as set forth in the Memorandum of Points and Authorities attached hereto and made a part hereof.

Respectfully submitted,
LAW OFFICES OF
JACK A. ETTINGER, P. C.
by (signature)
Louis L. Deckter
111 South Church Avenue
Tucson, Arizona 85701

MEMORANDUM OF POINTS AND AUTHORITIES

This court's en banc opinions of July 22, 1976, affirming Appellant Hart's conviction, turned on two issues: The extent of the Government's duty to produce a Government informant whose presence has been properly ordered by the trial court and the standard of review this Court will apply in reviewing the District Court's determination of whether or not the Government has met that burden. For the following reasons Appellant Hart submits that this Court erred in its ruling on said issues and, therefore, respectfully requests that this Court grant Appellant a rehearing in this matter.

I

THE GOVERNMENT'S DUTY TO PRODUCE A GOVERNMENT INFORMANT WHOSE PRESENCE HAS BEEN ORDERED BY THE TRIAL COURT.

It is well settled in this Circuit

that upon an order to produce an informant, the Government must make him available at or before trial or bear the burden of showing that although it expended "all reasonable efforts," it was unable to locate and produce said informant. United States v. Leon, 487 F.2d 389 (9th Cir. 1973); Velarde-Villarreal v. United States, 354 F.2d 9 (9th Cir. 1965). However, what constitutes a "reasonable effort" in any given case can only be determined by the totality of circumstances as they exist in that case. For, as Judge Hufstedler noted in dissent herein, the development of reasonableness rules grew out of a recognition that "in many areas of the law... per se rules are often unworkable." (Hufstedler, J., dissenting, p.4). Hart respectfully submits that the Government's efforts herein did not rise to the standard established in this Circuit as "reasonable"

and that this Court has erred in holding that the Government has met its burden in this case.

The decision rendered by this Court concludes that merely because an informant lives "south of the border" does not require that a different standard be applied.

As this Court put it, "An informer can go underground in New York City, Chicago or Los Angeles and be just as unavailable... and the same rules should and do apply." (Opinion, p. 8). If, by this statement, this Court means that the "reasonable effort" test applies equally in both situations, Appellant Hart would agree. However, the two situations differ drastically in regard to determining what efforts are deemed "reasonable" in the Government's attempts to locate and produce the informant. When an informant is in the United States, whether he is "underground" or not, the defense also

has the ability to independently discover the whereabouts of the informant and to subpoena him so as to compel his attendance. Indeed, the major distinction between the two cases is that where an American informant is involved, defense counsel has the same ability as that of the Government of compelling the informant to attend a trial through the subpoena power. Thus, the efforts demanded of the Government could be justifiably lesser than in the case where an alien informant is used.

In the case at bar however, the circumstances are so different that due process and fundamental fairness require that a stricter duty should be imposed upon the Government to attempt to produce Murrieta before the Government's efforts can be deemed "reasonable." In this case, both the defense and the Government knew exactly where Murieta could be located as it was

discovered early in the case that Murrieta is the owner of a grocery store which he personally operates at the intersection of Lopez Matos Jalisco in Magdelena, Sonora, Mexico. (Transcript, Interview of Witness, pp. 45-47). However, unlike the case where an American informant is involved, Hart was powerless to compel Murrieta's attendance as he was beyond the subpoena power of the Court. Indeed, in this case, the only influence that could be exerted to secure Murrieta's attendance had to come from the Government - in its role as Murrieta's employer. Yet, as the record clearly indicates, the Government failed to initiate any contact with Murrieta at all. Instead, Lugo merely waited until Murrieta, at his convenience, contacted Lugo.

Hart respectfully submits that in such circumstances, it was incumbent upon the Government to exert more forceful efforts to produce Murrieta before its duty to exert "reasonable" efforts was satisfied.

For example, it would have been very easy for Lugo to go to Murrieta's grocery store and personally remind Murrieta of his responsibility to testify when called upon by the Government. Such direct contact with one's employer is certainly more persuasive than a telephonic conversation initiated by the employee. Furthermore, in any one of those many telephone conversations, Lugo could have informed Murrieta that his failure to appear and testify would result in his termination of employment with the United States Government. This course of action was specifically approved by this Court in cases such as this where there appears to be an unwilling informant involved whose testimony is crucial to the defense. See, United States v. Leon, 487 F.2d 389, 392 (9th Cir. 1973). But, to the contrary, rather than conditioning Murrieta's future employment on his availability as a witness in

this case, the Government continued to employ him in "further investigations" in spite of his obvious intentions not to appear, as ordered, in this case. (See, Transcript, Motion To Continue, August 12, 1974, p..22, lines 12-17). Finally, the Government could have withheld a portion of Murrieta's "reward" in this case contingent upon his completion of his role in this case, i.e., testifying at trial if his testimony became necessary. Instead, Murrieta was fully compensated and permitted to return to Mexico despite, or, perhaps, because of the Government's knowledge of the materiality of Murrieta to the defense in this case. Obviously, full payment leaves little incentive for Murrieta to cooperate further in the case.

Appellant Hart does not contend that this Court must declare the Government the "Guarantor" of the informant's presence every time a defendant alleges entrapment. It has consistently been Hart's position that

it is the unique facts of this case which create in the Government the duty to exert more forceful efforts to produce Murrieta in order to assure Hart's fundamental right to a fair trial. To hold otherwise is to emansculate the "reasonable efforts" test to such an extent that it will be unable to prevent the very evil it was created to protect against, i. e., the risk of entrapment by over zealous and, often times, inadequately trained Government "agents" eager to earn their "reward" in any particular case.

While this Court's opinion intimates that the Government had no reason to suspect Murrieta's availability before this case, the record clearly establishes ample reason for concern. It is true that Murrieta testified in May, 1974, in a different case, for the Government. However, it must be remembered that Murrieta's appearance at

that trial is the only instance of record in which Murrieta was called upon by the Government. Every other instance of record in which Murrieta was involved demonstrates that Murrieta was given a free reign in his activities. Murrieta picked his own subjects for investigation. It was Murrieta who contacted Lugo; Lugo never initiated even one telephone call to Murrieta. In fact, it was not until this case was in progress that Lugo even learned of any address at which Murrieta could be contacted. Furthermore, Murrieta's actions in this case clearly establish the necessity for concern over his availability. The record is replete with broken promises by Murrieta that he would appear. (See, e.g. T.T. pp. 39-40). Yet, Lugo never intensified his efforts to produce Murrieta but merely continued to tell him that it was "important" that he come to Tucson. (Id.) There can be no doubt

that Murrieta's early conduct should have caused Agent Lugo concern regarding his sincerity and reliability. Thus, the Government should have initiated more intense efforts on Lugo's part to secure Murrieta's attendance. At the very least, Lugo could have, and should have, conditioned Murrieta's future employment with the D.E.A. upon his availability as a witness, as this Court held was necessary in United States v.Leon, 487 F.2d 389, 392 (9th Cir. 1973). Also, as pointed out above, Lugo should have attempted to initiate a contact with Murrieta at Murrieta's grocery store in Magdalena, Sonora, Mexico, to personally emphasize the importance of Murrieta's attendance. Yet, Lugo did not resort to either of these measures to persuade Murrieta to attend the trial. Clearly, the efforts employed by Lugo in this case cannot be deemed "reasonable" undercircumstances such as these, where the

Government chose to utilize Mexican Nationals with full knowledge that upon their certain return to Mexico, they would be immune from the subpoena power of the Court.

It is Hart's contention that he is entitled to a rehearing in this matter because this Court has erred in finding that Agent Lugo, "exerted every reasonable effort" to procure the attendance of Murrieta at Hart's trial in light of the totality of circumstances involved in this case. For it must be remembered by this Court, that Murrieta's testimony did not go merely to a collateral issue, nor was it merely cumulative or coroborative. Rather, Murrieta's testimony was necessary for the very essence of the defense as it was Murrieta alone who could either substantiate or refute Hart's claim of entrapment. Thus, the extreme importance of Murrieta's testimony is another

factor weighing in favor of requiring the Government to use more forceful efforts to secure his attendance at trial than were used here.

Hart fully concurs that the Government is not the "guarantor" of an informant's presence but requests that this Court hold the Government to a standard of reasonableness necessary to assure Hart a fair trial. This Court must not leave the decision of whether or not a defendant will receive a fair trial to the unfettered discretion of untrained, alien informants whose only interest in the receipt of their "reward" for making a successful case. By sustaining the Government's "efforts" in this case, this Court has done just that. Accordingly, Hart requests this Court to reconsider its decision in this case.

II

THE APPROPRIATE STANDARD OF REVIEW FOR THIS COURT TO APPLY IN THIS CASE.

The majority decision in this case held that the "clearly erroneous" rule of review must be applied herein as the determination of the reasonableness" of the Government's efforts is a question of fact. In response to this contention, Hart respectfully adopts the opinion written by Judge Hufstedler as it is clear that that opinion expresses the correct rule regarding the applicability of the "clearly erroneous" rule. The determination of the reasonableness of the efforts employed by Agent Lugo is a conclusion based on the application of a legal standard. Hart respectfully submits that Fleischmann Distilling Corp. v. Marer Brewing Co. 314 F. 2d 149 (9th Cir. 1963) is determinative of this issue in its holding that the "clearly erroneous" rule has no application when a finding is not one which resolves disputed facts, but rather, one which determines the

the legal effect of certain transactions or events. 314, F.2d at 152 n.2. In the case at bar the determination of reasonableness resulted in a conclusion regarding a legal standard taking said determination out of the "clearly erroneous" rule. Therefore, Hart submits that said rule does not preclude this Court from reviewing the determination of reasonableness made by the trial Court in this case.

III

C O N C L U S I O N

For all the foregoing reasons, Appellant Hart respectfully urges that he is entitled to a rehearing in this matter and requests this Court to order said rehearing.

RESPECTFULLY SUBMITTED this 3rd day of August, 1976.

LAW OFFICES OF
JACK A. ETTINGER, P.C.

by (signature)
Louis L. Deckter
111 South Church
Tucson, Arizona
85701
Attorneys for
Appellant Hart

CERTIFICATE OF SERVICE

I, Louis L. Deckter, hereby certify that I mailed copies of this Petition For Rehearing of the appellant this 3rd day of August, 1976, to:

William C. Smitherman
United States Attorney
James E. Mueller
Assistant United States Attorney
Post Office Box 1951
Tucson, Arizona 85701 (2 copies)

Robert Dale Hart, 40302-156
4980 South 17th Avenue
Tucson, Arizona (1 copy)

(signature)
Louis L. Deckter

Appendix G

CAPTION OMITTED

ORDER

Having been considered:

1. The Petition For Rehearing in the case of United States v. Robert Dale Hart, No. 74-3001, is denied.

2. The Motion For Rehearing and Suggestion For Rehearing En Banc in the case of United States v. Ruben Morales Robles, No. 74-3270, is denied.

Supreme Court, U. S.
FILED
JAN 6 1977
MICHAEL RODAK, JR., CLERK

No. 76-408

In the Supreme Court of the United States

OCTOBER TERM, 1976

RUBEN MORALES ROBLES AND ROBERT DALE HART,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
GEORGE S. KOPP,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the court of appeals sitting *en banc* (Pet. App. D) is not yet reported. The earlier panel opinion (Pet. App. A) is also not reported.

JURISDICTION

The judgment of the court of appeals *en banc* was entered on July 22, 1976. A petition for rehearing *en banc* was denied on August 19, 1976 (Pet. App. G). The petition for a writ of certiorari was not filed until September 20, 1976, and is accordingly out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the requirements of due process are satisfied by the government's making reasonable efforts to produce an informant at trial, and whether such efforts were made in this case.

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, petitioners were convicted of distribution of cocaine, in violation of 21 U.S.C. 841(a)(1). Each was sentenced to five years' imprisonment, a $3,000 fine and five years' special parole.

A panel of the Ninth Circuit reversed both convictions. It ruled that the district court had erred in not allowing petitioner Robles to assert an entrapment defense unless he first took the stand and admitted doing the acts charged, which Robles refused to do (Pet. App. iii-iv); it further ruled that both petitioners' convictions must be reversed because the prosecution is to be deemed a "guarantor" of the appearance at trial of an informant in this case, who did not in fact appear (*id.* at ix-xi).

The court of appeals *en banc* reversed the latter ruling, holding that the prosecution is not a guarantor of the appearance of informants, that the test was whether the government had used reasonable efforts to secure the appearance of an informant subject to court order to appear, and that on the particular facts of this case the government had satisfied that test (Pet. App. xxxvi-l). The *en banc* court agreed with the panel, however, that petitioner Robles should have been allowed to raise entrapment as a defense notwithstanding his refusal to take the stand and admit the elements of the crime (*id.* at li-lii). Accordingly, petitioner Hart's conviction was affirmed and petitioner Robles' conviction was reversed and remanded for further proceedings (*id.* at liii).

1. In April 1974 government informants Murrieta and Borjorquez introduced Agent Lugo of the Drug Enforcement Administration, who was posing as a prospective cocaine purchaser, to petitioner Hart (R. Tr. 5-8; H. Tr. 51-54).[1] The informants had previously obtained a sample quantity of cocaine from one of petitioners' associates and in turn had given the sample to DEA agents for testing (R. Tr. 43-44). Murrieta thereafter telephoned petitioner Hart, who told him to come to his house to complete the sale (R. Tr. 27; H. Tr. 51-52). Petitioner Robles was at petitioner Hart's house during the transaction (R. Tr. 7; H. Tr. 53). A price was negotiated, and Robles contacted petitioners' supplier, who delivered the cocaine shortly thereafter. Petitioner Robles left the house momentarily to accept delivery (R. Tr. 9-17; H. Tr. 57-65). When he returned the cocaine was weighed and handed to Agent Lugo. Petitioners were then arrested (R. Tr. 17-22; H. Tr. 68-72).

2. On June 12, 1974, petitioner Hart moved that the government disclose the identity of and produce any informants involved in the events covered by the indictment. Following a hearing on June 17, 1974, the district court granted the motion and scheduled the trial for August 13, 1974. The government immediately gave petitioners' counsel the names of both Murrieta and Borjorquez.

On July 25, 1974, Borjorquez appeared in Tucson and was interviewed at length by petitioners' counsel (aided by a court interpreter). Borjorquez stated that both he

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[1] "R. Tr." and "H. Tr." refer to the respective one-volume transcripts of the trials of petitioners Robles and Hart. "M. Tr." refers to the one-volume transcript of the August 12, 1974, hearing on petitioners' motion for a continuance. We are lodging copies of these transcripts with the Clerk of this Court.

and Murrieta were residents of Mexico; that Murrieta operated a grocery store at a specific address, which he furnished counsel; and that he had asked Murrieta to come to Tucson but that Murrieta could not because he was sick (Pet. App. xxxvii-xxxviii).

Petitioners then moved for a continuance based on Murrieta's failure to appear for an interview. At a hearing on the motion held on Monday, August 12, 1974, Agent Lugo testified that on at least a dozen occasions in the preceding month he had told Murrieta and Borjorquez that they would have to be present for the trial (M. Tr. 19-22; Pet. App. xxxviii-xxxix). In none of these conversations did either informant indicate that he would not be present. Indeed, on the day before the hearing both informants had assured him that they would come to Tucson for a pretrial interview and for the trial (M. Tr. 23-34). The district court denied petitioners' motion with leave to renew it the next day if Murrieta had still not appeared (M. Tr. 37-38; Pet. App. xxxix).

Murrieta did not arrive on Tuesday and another hearing was held on that day. Agent Lugo testified that Borjorquez had telephoned him shortly after the previous day's hearing and that during the conversation he had strongly admonished Borjorquez to bring Murrieta to Tucson at once. He also testified that he told Borjorquez to call him from the border and that he would drive them to Tucson (Pet. App. iv1). The informants had not, however, telephoned or otherwise contacted Agent Lugo (M. Tr. 35-36). The district court denied the motion again. It ruled (Pet. App. 1iv n. 2):

> It appears to me that the Government has met the burden that they must bear. They've done everything required to do lawfully, legally to get these witnesses here.

3. In affirming, the majority of the *en banc* court of appeals placed heavy emphasis on the fact that, until his nonappearance in the present case, Murrieta

> had always been cooperative. He had promised to testify in court in May [1974] in [another] narcotics case and had appeared and testified as he had promised. He had not at that time refused to cooperate in any respect so far as the record shows. Neither had he failed to keep any commitment to testify. [Pet. App. iv1ii.]

The court of appeals also noted that there was no evidence whatever that the government had "participated" in Murrieta's absence (Pet. App. 1vi n. 7); that the record was silent regarding the reason for his absence (*id.* at ivliv); and that at the time in question the government had had "no reason to suspect that [Murrieta's] future performance would be any less than the 100 percent performance of the past" (*ibid.*).

ARGUMENT

The *en banc* court of appeals correctly ruled that the government is not a guarantor of an informant's presence at trial. This proposition is uniformly accepted in the courts of appeals. See *United States* v. *Williams*, 496 F. 2d 378, 382 (C.A. 1); *United States* v. *Super*, 492 F. 2d 319, 321 (C.A. 2), certiorari denied *sub nom. Burns* v. *United States*, 419 U.S. 876; *United States* v. *Jones*, 492 F. 2d 239, 242 (C.A. 3); *United States* v. *White*, 344 F. 2d 92 (C.A. 4); *United States* v. *Tatum*, 496 F. 2d 1282, 1284 (C.A. 5); *United States* v. *Craig*, 477 F. 2d 129 (C.A. 6); *United States* v. *Cansler*, 419 F. 2d 952, 954 (C.A. 7), certiorari denied, 397 U.S. 1029; *United States* v. *Pollard*, 483 F. 2d 929, 931 (C.A. 8), certiorari denied, 414 U.S. 1137; *United States* v. *Hayes*, 477 F. 2d 868, 871 (C.A. 10). Indeed, no court of appeals applies a test any more

stringent than that adopted by the Ninth Circuit here—that the government is required to make a "reasonable effort" to produce a government informant whose presence has been properly requested by the defendant (Pet. App. xxxvi). After a careful review of the record, the court of appeals concluded, as had the district court, that in this case the government had satisfied that test. This factual determination does not warrant further review. *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635.

Furthermore, the court's conclusion was correct. As it noted (Pet. App. iv1iv), Murrieta had honored previous government instructions to appear and had given no indication that this time would be any different. Agent Lugo repeatedly urged the informants to make themselves available for trial and offered to assist them in doing so. In these circumstances, as the district court determined (Pet. App. ivlv), the government had done everything reasonably necessary and proper that could be required legally to get these witnesses to trial.[2]

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[2]Petitioners' claim that a conflict exists among the circuits regarding the application of the "reasonable efforts" standards (Pet. 19-25) is unsupportable. In *United States* v. *Williams,* 496 F. 2d 378 (C.A. 1), cited by petitioners (Pet. 23), the court said, in language that is fully consistent with the decision in this case, that "should an informer disappear or become unavailable to the defense, we would compel the government, upon timely demand, either to locate him or make an affirmative showing satisfactory to the court why it could not reasonably be expected to do so and of its diligence generally as regards the disappearance" (496 F. 2d at 382).

Nor does *United States* v. *Jones,* 492 F. 2d 239 (C.A. 3), also cited by petitioners (Pet. 20), conflict with the instant decision. There the government advised the defense of the existence of an informant but did not disclose his identity. Not until the day of trial did the government tell the defense that the informant would not be called as a witness, and only at that point did the government make any effort to locate the informant. Moreover, during trial the government gave two different addresses for the informant's place of residence. The court concluded that the government had failed to undertake a serious search for the informant

Petitioner is not aided by *United States* v. *Mendez-Rodriguez,* 450 F. 2d 1 (C.A. 9). There the court ruled that due process was denied when the government returned to Mexico aliens who were potential witnesses but who were unavailable to the defendant by virtue of the government's conduct. In contrast, nothing in the record in this case suggests that the government participated in any way in Murrieta's failure to appear. See Pet. App. 1vi n. 7.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1977.

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and that that failure, coupled with an "accumulation of mishaps[,] so hampered the defense that fairness requires a new trial" (492 F. 2d at 242). Here, however, the government advised the defense long before trial of the identity and location of the informants, and it did everything reasonably within its power to secure their presence prior to trial.

[3]Petitioners also claim (Pet. 26-29) that they were denied their right to appellate review because the court of appeals applied the clearly erroneous standard in reviewing the district court's finding that the government had made reasonable efforts to produce Murrieta. There is no occasion for this Court to review this contention, for even under the most searching standard of appellate review the result here would remain unchanged, given the history of Murrieta's cooperation, the government's nonparticipation in his failure to appear, and Agent Lugo's repeated attempts to secure Murrieta's presence.

DOJ-1977-01